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Nos. 510 and 511

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In the Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
BALTIMORE & OHIO RAILROAD COMPANY
CHESAPEAKE & OHIO RAILWAY COMPANY

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

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MOTION TO AFFIRM

THE CHESAPEAKE & OHIO RAILWAY COMPANY

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

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MOTION TO AFFIRM

of

The Chesapeake & Ohio Railway Company

and

The Baltimore & Ohio Railroad Company

The Chesapeake & Ohio Railway Company (C&O) and The Baltimore & Ohio Railroad Company (B&O), pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

STATEMENT

These are direct appeals from the final judgment of a specially constituted District Court of three judges established pursuant to Section 2284 of the Judicial Code (28 U.S.C. § 2284) dismissing Appellants' complaints to set aside an order of the Interstate Commerce Commission. The final judgment dismissing the complaints was entered August 28, 1963, on the basis of an opinion filed August 13, 1963 (—— F. Supp. ——). Notice of appeal was served on September 11, 1963. On September 30, 1963, appeal papers were filed with this Court by Appellants Brotherhood of Maintenance of Way Employes and Railway Labor Executives Association (No. 510); and on October 1, 1963, by Appellants Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, The International Association of Machinists, and The Brotherhood of Railway Carmen of America (No. 511).

Appellants challenged a report and order of the Interstate Commerce Commission, served December 31, 1962, which authorized C&O, in accordance with Section 5(2) of the Interstate Commerce Act and subject to specified conditions, to acquire stock control of B&O. *Chesapeake & Ohio Railway Company—Control—Baltimore & Ohio Railroad Company*, 317 I.C.C. 261 (1962). On February 1, 1963, and following hearing, a motion for an order temporarily restraining the Commission's order was denied by District Judge Thornton. C&O thereupon consummated control of B&O, as it was required by the terms of its offer to do. The full three-judge Court heard and denied, on May 1, 1963, a motion by intervener complainants (Appellants in No. 511) for a preliminary injunction directed against the continuation of control.*

* With the consent of the intervener railroad defendants, District Judge Thornton entered an order which, broadly speaking, prevented C&O and B&O *pendente lite* from taking any action,

The three-judge Court heard a full day's argument on the merits on May 23, 1963. Its subsequent opinion analyzed Appellants' contentions and rejected them. The District Court tested the Commission's determination in the light of standards which this Court has very often delineated—both the general standards which must be met by administrative determinations, and the particular standards to which the Commission must adhere in exercising the authority granted to it under Section 5(2) of the Interstate Commerce Act. The District Court was clearly persuaded that the Commission's action was in full compliance with all of them.

ARGUMENT

The grant of a motion to affirm is fully warranted in the present circumstances. When the Commission has carefully subjected a great mass of evidence to its own expert appraisal, and when a District Court has unanimously found and persuasively demonstrated that the Commission followed proper standards in doing so, this Court should not be required to restate principles which are thoroughly understood and unchallenged. The principles which govern the Commission's discharge of its duties under Section 5(2) have been very adequately portrayed. *E.g. McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *Schwabacher* v. *United States*, 334 U.S. 182 (1948); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954); *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173 (1959).

This is merely another case involving the adequacy of findings and the supporting evidence. The appeals pre-

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as a result of the effectuation of control, which would prejudice such of their employees as were represented by complainants. This restraint, again with the consent of the intervener railroad defendants, was continued pending disposition of the present appeal, conditioned upon an appeal's being docketed by October 1, 1963.

sent no novel questions (cf. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957)), no sharp question of statutory interpretation (cf. *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961)), and no question as to the scope of the Commission's jurisdiction (cf. *County of Marin* v. *United States*, 356 U.S. 412 (1958)). There are no questions which are unusual, difficult, or substantial, requiring plenary consideration by this Court. Appellants have simply been disappointed by the Commission's decision authorizing a C&O-B&O affiliation, and with the District Court's sustaining that decision. They are now hopeful that they can persuade this Court to sit in substitution of the Commission to resurvey the mass of evidence in the Commission proceedings. Opposition to a railroad consolidation on general grounds, involving only the adequacy of findings and evidence, has been determined not to present substantial questions. See *City of Nashville* v. *United States*, 155 F.Supp. 98 (M.D. Tenn. 1957), affirmed upon motion, 355 U.S. 63.

1. Appellants attack the adequacy of only those findings, and of their supporting evidence, which dealt with the competitive effects of a C&O-B&O affiliation upon other carriers. As to this, the District Court perceptively noted that it was "significant," while "not controlling," that no carrier had joined the present Appellants in this claim. It is certain, indeed, that the point which Appellants seek to lay before this Court has strange advocates. Here are organizations of railroad employees, not complaining about the aspects of the Commission's decision which provided protective conditions for the benefit of labor (conditions more beneficial to labor than those recently approved by this Court in *Brotherhood of Maintenance of Way Employes* v. *United States*, *supra*), but complaining about the possibilities of injury to other rail carriers. In reverse circumstances, if other rail carriers were the only opponents of a C&O-B&O affiliation, and if the grounds of opposition were the alleged injurious im-

pact upon railway labor, this Court might well view such claims with skepticism. Here, it is reasonable to believe that, had the Commission misconceived the possibilities of injury to other rail carriers from a C&O-B&O stock affiliation, opposition would be voiced by the affected rail carriers.

In the District Court, Appellants enjoyed the support of the Department of Justice. The Department of Justice on behalf of the United States, in its answer as a statutory defendant, took "no position on the ultimate question whether the proposed acquisition is consistent with the public interest," but confessed that the Commission's order was "not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Railway Company of control of the Baltimore & Ohio Railroad Company." The United States has now determined that C&O control of B&O "is in the public interest" (see, *infra*. p. 14), and the support which Appellants enjoyed in the District Court has been withdrawn. More importantly, the United States has withdrawn its support from Appellants under circumstances which rob Appellants' claims of any significance. Appellants address themselves to a cause which, if not legally moot, has been rendered devoid of any practical question which merits this Court's consideration. The significance of this withdrawal of support by the United States can be better understood against a fuller background of the Commission proceedings and decision.

2. C&O undertook in 1960 to acquire stock control of B&O by offering B&O stockholders an opportunity to exchange their B&O stock for stock in C&O. This C&O offer was countered by a similar exchange offer to B&O stockholders by The New York Central Railroad Company (Central). Competitive applications to acquire control of B&O were filed by C&O and Central, C&O's appli-

cation being filed in June, 1960. C&O's application explicitly stated that C&O and B&O intended, from the base provided by stock affiliation, to plan for a merger between the two carriers at the earliest practicable date.

The fact of competitive applications, the size and experience of the competitors, and the character of the allies who came to their aid,* assured a bitter contest before the Commission. At the consolidated hearing, there was a prolonged and detailed exposure of, and inquiry into, every facet of the public interest considerations involved in a C&O-B&O affiliation. Salient facts respecting the proceedings are these: they involved about 150 parties represented by 69 lawyers; the hearing occupied 37 days, was held in 7 cities, heard 394 witnesses, required 5,686 pages of transcript, and involved 550 exhibits; typical Commission procedures were followed, involving an Examiner's Recommended Report (which was favorable to a C&O-B&O affiliation), exceptions to the Report, replies to the exceptions, and oral argument before the entire Commission; the Commission's decision (reached by a majority of 8 to 3) was served slightly more than two and one-half years after the application was filed.

Appellants, in focusing upon the Commission's appraisal of the competitive effects of a C&O-B&O affiliation, have provided this Court with a highly distorted view of the Commission's decision. The Commission, in appraising the mass of evidence before it, was obviously required to determine whether C&O stock control of B&O had merit, as well as to consider whether such possible merit was offset by disadvantages. In appraising the affirmative aspects of the proposed affiliation, the Commission concluded that it offered outstanding benefits in the public interest. Appellants, though occasionally deprecating the significance of

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* Central had the continuous support of such parties as the State of New York, the New York Port Authority, the Commonwealth of Massachusetts, and the New England Council.

this aspect of the Commission's determination have never seriously challenged it. Neither did the Commission dissenters nor anyone else.*

The Commission's decision may be said to have flowed along the following lines: B&O having fallen into monstrous debt during the depression, has ever since been plagued by financial weakness which two voluntary reorganizations and a 1955 refunding operation failed to solve. Compelled to apply most of its surplus funds to debt reduction, B&O lacked the capital (1) to modernize its properties, (2) to undertake cost-reducing capital improvements in anything like the degree required, and (3) to maintain adequately its physical properties which slowly sank into deplorable condition. Financial weakness imposed cumulative and accelerating penalties since functionally-obsolescent and inadequately-maintained properties forced artificially high operating expenses. B&O, saddled by high-cost operations, forced into uneconomic practices, constantly driven to wasteful, stop-gap measures, became more and more unable to do those things which became increasingly imperative. The downhill slide became alarmingly abrupt in 1961 when B&O suffered a net operating deficit of $31.3 million and when its net working capital position declined, by yearend, to a negative figure of $24.4 million (317 I.C.C. at 271-272).**

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* Commissioner Tucker, joined by Comissioner Webb in dissent, noted: "I must again reiterate that I see no harm in an appropriate B&O-C&O affiliation, in and of itself" (317 I.C.C. at 318), and that "a B&O-C&O system might even become a desirable instrument of public policy" (*Id.* at 331). Dissenting Commissioner Bush did "not feel apprehension against any appropriate alignment of these railroads but I would prefer to see it applied for as a good, solid, constructive merger proposal" (*Id.* at 332).

** The Record contained, and the Commission referred to, many illustrations of the vicious downward drag imposed on B&O by its own financial weakness. B&O's direct derailment expenses were running at a rate almost ten times as great as those of C&O. B&O's inability to maintain its properties adequately was the

The Commission also determined that: B&O, mortgaged virtually to the hilt, had exhausted all expedients for raising capital available within its own resources and required an infusion of capital from outside if it was to survive as an effective transportation medium. The proposed affiliation of C&O and B&O would unite two well-adapted partners (who are little competitive) and would provide B&O with an answer to its problems. C&O, since World War II, has spent nearly $2 billion in completing a modernization program for its properties and maintaining them; C&O has the experience and financial strength, and (with stock control of B&O) would have the incentive, to undertake for B&O just such a rehabilitation program as B&O so imperatively requires and as C&O has completed for itself. C&O presented concrete plans (which the Commission analyzed in detail and approvingly) to assist B&O in quarter-billion dollar modernization and rehabilitation program which would restore B&O as an effective and adequate instrument of commerce.*

The Commission continued: B&O's failure to survive would deal a heavy blow to the shipping public in the important eastern states in which it operates. The needs

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cause of these wasted millions in derailment expenses. The "appalling" condition of B&O's rolling stock (the characterization is the Commission Examiner's which the Commission adopted, 317 I.C.C. at 334) at times forced the closure of coal mines for lack of coal cars—with consequent hardship to mine owners and employees. (See e.g. Ex. H-185, p. 5; Ex. H-172, pp. 3-4).

* Dissenting Commissioner Tucker's strong statement on this aspect of the case was: "No party in this case has questioned the need for improving B&O's facilities or that these [C&O's] plans would meet B&O's requirements" (317 I.C.C. at 311). The Department of Justice recognized the public stake in improving B&O's facilities and service. The Department's press release which accompanied the filing of its answer in the District Court, quoted the Attorney General as saying: "We are aware of the difficulties the B&O has had. The B&O is in our view entitled to expeditious action by the Commission in obtaining essential information and making the necessary determinations."

of commerce and of national defense, which dare not be ignored, are of paramount importance to the country. C&O control of B&O is not a merely a temporary palliative for B&O's problems, but reflects an effort by the railroads themselves to work out their long-range problems. Through the use of joint facilities and personnel and the pooling of equipment, all made possible by the community of interest consequent upon the affiliation, both railroads would be able to achieve substantial reductions in operating expenses. Less expensive and more efficient operations by both railroads would contribute to the national interest in an adequate transportation system. Insofar as B&O is concerned, its properties "are in dire need of rehabilitation" (317 I.C.C. at 275), and unless "major improvements - - - are undertaken immediately, its ability to compete with other railroads and other modes of transportation will be seriously jeopardized" (*Id.* at 290-291).*

Against this appraisal of the benefits of a C&O-B&O affiliation, the Commission weighed claims of disadvantages. The New York Central Railroad Company presented evidence in opposition to a C&O-B&O affiliation, claiming that such an affiliation (in conjunction with a seven-carrier combination, founded on Pennsylvania and Norfolk & Western, which Central wrongly postulated)

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* Appellants in No. 511 say (J.S., pp. 8-9) that "this case involves two great obsessions against change which are strangling railroad service in our Nation: (1) That of ICC against moderization of its procedures to meet current and future public needs; (2) that of the railroads against modernization of their performance to meet current and future public needs." As to the alleged "obsession" of the railroads, these railroads point out that Appellants say this in a proceeding in which they are *opposing* an affiliation which will make it possible for B&O to undertake a vitally needed quarter-billion dollar modernization program. An independent expert referred to B&O as "an organization shaken by reason of inability to do the things they long realized should be done to make the Baltimore and Ohio an efficient operating organization." (Ex. H-174, p. 22).

would divert such large amounts of freight traffic from it as to destroy its competitive abilities.* The Commission carefully examined Central's evidence on this score and concluded that it had "little probative value" (317 I.C.C. at 281). It also examined the traffic divertibility studies of both B&O and C&O and found the principles upon which they were constructed to be sound. From this and other evidence extensively discussed in its report, the Commission determined that a C&O-B&O affiliation would not unduly injure any other rail carriers and would not seriously affect their abilities to render an adequate transportation service.

3. The Commission's conclusion that neither Central nor any other rail carrier would suffer "undue diversion" of traffic drew the principal fire of Appellants below. Appellants relied heavily on the dissenter's characterization of this finding as a "groping, meaningless generalization" (317 I.C.C. at 319) which could never withstand judicial review. They argued that the Commission was required to find precisely how much traffic diversion from New York Central, if any, the Commission foresaw, and that the absence of any definitive finding on this score destroyed the validity of the Commission's decision.

The District Court concluded that the Commission "was not required to engage in speculation and guesswork to come up with a precise percentage prediction." This con-

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* Other rail carrier interveners were: Chicago and Eastern Illinois Railroad Company, which originally sought inclusion, but withdrew upon reaching a consolidation agreement with L&N (Transcript of Commission Hearing, pp. 3138-3139); The New York, New Haven and Hartford Railroad Company which intervened solely to assure that existing rail routes would remain open and was early satisfied on this score (*Id.*, p. 153); the Boston and Maine Railroad Company which intervened as its "interests may develop" and never opposed the merits of the application; and the Pittsburgh & Lake Erie Railroad Company, a subsidiary of New York Central, which participated in Central's opposition as a family line.

clusion is so clearly correct as to present no substantial question for this Court's determination. The Commission recognized that "the volume of traffic diversion cannot be determined with mathematical precision" (317 I.C.C. at 280) and it wisely refused to couch a finding in mathematical terms when to do so would merely give a delusive implication of certainty where none can exist. Even if the Commission had determined in specific mathematical terms the amount of traffic diversion which it foresaw, it would still have been required to determine whether this percentage of diversion was outweighed by such other factors as the public stake in the rehabilitation of B&O—i.e., whether this amount of diversion was "undue."

The very vigor of Central's opposition to a C&O-B&O affiliation did, however, provide Appellants with the cue for the second of their two principal arguments. Exhaustive analyses of Central's traffic were presented by B&O and C&O, all establishing conclusively that no significant amounts of Central's traffic could be diverted. There were perhaps 2,000 pages of testimony focused upon the expansive claims of Central as to traffic diversion. Since no other carrier claimed that a C&O-B&O affiliation would divert traffic from it, there was no evidence by any other carrier, no critical counter-study by C&O or B&O, and no occasion for the Commission as extensively to discuss what none of about 150 parties urged. In this very absence of affirmative claims of traffic diversion by other rail carriers, Appellants found their opportunity to urge that there was no adequate evidence to support the Commission findings that there would be no significant harm to rail carriers *other than Central*, though other evidence affirmatively negated the likelihood of such injury.

The District Court's opinion persuasively disposed of this claim. The District Court pointed out that representatives of a large number of major shippers testified that a C&O-B&O affiliation would not cause any change

in their habits of choosing rail carriers, and found their testimony "of impressive weight." * These witnesses testified unanimously that a C&O-B&O affiliation would not cause their companies to divert traffic from or be injurious to other rail carriers. Many testified affirmatively that a C&O-B&O affiliation would be advantageous to other eastern rail carriers since B&O's improvement would hold traffic to rails which was now being lost to competitive truck or water lines or to private carriers. This is hard and realistic evidence which clearly supported and required the Commission's findings that a C&O-B&O affiliation could not affect significantly and adversely the ability of any other rail carrier to render adequate transportation service.

Additionally, the Commission took into account and discussed the voluminous evidence of C&O and B&O officials which revealed, in almost ultimate detail, the complete flow of freight traffic in the territories where they operate. Officials of both B&O and C&O analyzed this mass of documentation and showed that as a practical matter they could not divert significant amounts of freight traffic from any of their competitors. A variety of considerations, founded on self-interest, would even render it disadvantageous to attempt to do so.** Furthermore, while a

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* Among several hundred witnesses, many testifying at the behest of C&O or B&O and many more testifying at the behest of Central, were representatives of such major shippers as Anchor Hocking Glass, Consolidation Coal, Dow Chemical, Eastman Kodak, Ford Motor, Island Creek Coal, Koppers, E. J. Lavino, Mead, National Distillers, Owens-Illinois Glass, Pennsylvania Glass Sand, Quaker Oats, Studebaker, and West Virginia Pulp & Paper.

** A concrete example may illustrate the looseness of charges the Commission lacked evidence on the effect of a C&O-B&O affiliation upon other rail carriers (not including New York Central). Below, it was suggested that since C&O and the Norfolk & Western Railroad Company operated many competitive routes it must be true that B&O would henceforth divert to C&O its traffic previously interchanged to Norfolk & Western. But the record showed (Ex. H-90) that B&O has relatively little traffic to deliver

C&O-B&O affiliation was confined to a stock control relationship, respect for the interests of the stockholders in the two companies would effectively prevent their pursuing other than their own self-interest. With a very full picture of freight traffic flow in the northeast quadrant of the United States, and with definitive studies proving that a C&O-B&O affiliation provided no opportunities to divert significant volumes of traffic from such a principal rail competitor as Central, the Commission was in a position to exercise its special competence to appraise all competitive effects. *Market St. Ry. Co.* v. *United States*, 324 U.S. 548.

4. There has never been any merit in, or any substantial question raised by, the claims that the Commission failed to consider the effects of the C&O-B&O affiliation upon other rail carriers. But, if there had been, the recent action taken by the United States would effectively rob the issue of all practical significance. On April 5, 1962, in his Transportation Message to Congress, President Kennedy, noting that there had been a resurgence of consolidation activity among both rail carriers and air carriers, announced the formation of an Interagency Committee on Transportation Mergers (which included representatives of the White House and of the Departments of Justice, Commerce, and Labor) to formulate Government policies upon projected consolidations.* At the time when the Department of Justice partially supported Appellants' claims in the District Court, the Interagency Committee had not yet been able to formulate its recommendations. By October 1, 1963, governmental policy had been formu-

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to Norfolk & Western and receives well over twice as much from N&W. B&O could not afford to risk attempted diversion from N&W when to do so would invite retaliatory diversion efforts by N&W.

* See *Message from the President of the United States Relative to the Transportation System of our Nation*, April 5, 1962, H. Doc. 384, 87th Cong., 2nd Sess.

lated, and on that date Assistant Attorney General Orrick publicly announced the Government's conclusions. These conclusions, formally stated in hearings before the Commission on a proposal of New York Central and Pennsylvania Railroad to merge, included the following:

> "The Government's conclusion is that ultimate integration of the Chesapeake & Ohio and the Baltimore & Ohio, with proper conditions which may be imposed by the Commission at the time of their projected merger, could create a rational rail network which would permit improved service to the public. The United States supported a labor union appeal of the ICC order approving C&O's acquisition of control of B&O in the District Court, because of concern that the Commission had not adequately analyzed the impact of C&O-B&O affiliation upon other railroads. On the basis of its study, the United States now believes that the acquisition of control is in the public interest, and, if the case were remanded to the Commission, the United States would not oppose approval of the transaction.
>
> "In the meantime, the C&O and the B&O have entered into a stipulation with the Government consenting to a reservation of jurisdiction by the Commission so that the B&O control proceeding can be reopened by the Department of Justice, by any adversely affected carrier, or by the Commission itself when and if necessary to obtain the imposition of additional conditions to deal with any undue diversion of traffic from other railroads."

The stipulation to which the Assistant Attorney General's statement referred is printed as Appendix A to this Motion. As will be seen, the stipulation provides in substance that, should this Court let stand the Commission's approval of a C&O-B&O affiliation, and should it later be found that such affiliation resulted in "undue diversion of traffic from any other railroad in the territory," the Commission may impose such "further conditions and or-

ders as may be necessary and appropriate and in the public interest." This stipulation underscores and reinforces action taken by the Commission at the time it approved a C&O-B&O affiliation. At that time the Commission imposed extensive conditions having to do with the maintenance of rates and routes which were designed to protect rail competitors from undue diversion of traffic, and it then retained jurisdiction to supervise, implement and supplement the provisions which it imposed (See 317 I.C.C. at 345).

In the light of this stipulation, there seems to be no practical reason why this Court should now occupy itself with Appellants' arguments that the Commission failed adequately to consider the effects of a C&O-B&O affiliation on other carriers. Such an affiliation has been in effect since February 4, 1963. It it is having, or will have any unduly adverse effects on competitors of C&O or B&O, these competitors (or any other interested party, including these Appellants) have a forum for alleviation of their grievances. The door to the Commission will be wide open to all interested parties to demonstrate by experience that other rail carriers are being significantly hurt and to demand a cessation of injury. If there could have been any concern for the effects of a C&O-B&O affiliation upon other rail carriers, that concern must have been eliminated by the stipulation entered into between the United States and these Appellees.

On the other hand, this Court's review of Appellants' cause would inevitably postpone, if it would not frustrate, attainment of the great advantages which the Commission foresaw in a C&O-B&O affiliation. Here, the Commission has determined, and neither the Appellants nor anyone else has ever seriously disputed, that B&O's rehabilitation, made possible by C&O stock control and aid, is strongly in the public interest. Where the advantages of a C&O-B&O affiliation are great, and the alleged disadvantages

to others have been guarded against by stipulation, this Court is being asked to engage in a meaningless formalism in measuring the adequacy of the Commission's findings. What the District Court said has sharp practical application to the present situation:

> "The evidence in this case shows that the B&O, one of the very great railroad systems of the United States, is in critical condition. We think that it would be a disservice to the national policy to hazard the exposing of this railroad to continuing crises by postponing the help that appears to be available to it in the control proposal of the C&O."

Appellants in No. 511 suggest that B&O's needs must have been overstated since it reported an operating profit of $1.6 million in 1962. The testimony of B&O's president at the injunction hearing of February 1, 1963, destroyed this argument. He pointed out that even this marginal profit was made possible only by C&O aid, without which B&O would have had a 1962 deficit in the range of $8 million (Transcript of Feb. 1, 1963 Hearing, pp. 129-133). C&O, to alleviate the desperate condition of B&O's rolling stock, commenced leasing coal cars to it even in 1961 (317 I.C.C. at 277). Affidavits before the three-judge Court at the May 1, 1963, injunction hearing show that, by that date, B&O had acquired with C&O assistance almost $90 million worth of such needed equipment as freight cars, coal cars, and locomotives (See Affidavit of Hays Watkins, Jr., C&O Treasurer). B&O began to turn the corner when massive aid provided by C&O commenced to take effect. C&O's $85 million investment in B&O stock (*Ibid.*) provides the assurance that C&O will continue to aid B&O in a quarter-billion dollar rehabilitation program, precisely as the Commission envisaged (317 I.C.C. at 279-280).

5. Appellants further attack the Commission's Report and Order on a basis closely related to their claims previously discussed, and equally mooted from all practical viewpoints by the stipulation. The Commission report, approving a C&O-B&O affiliation, also dealt with and denied a motion by the Delaware and Hudson Railroad Company, joined in by others, including Appellants and the Department of Justice, that the C&O proceedings be consolidated with two other proceedings then pending before the Commission. The first of these involved essentially a merger among Norfolk & Western, the Wabash and the Nickel Plate;* the second involved a merger of the Pennsylvania Railroad Company and the New York Central.**

In the course of the C&O-B&O proceedings the Commission had twice before denied motions by opponents of a C&O-B&O affiliation that the proceedings be consolidated with such other affiliation proceedings among eastern railroad carriers as were then pending. In this third refusal to permit a decision in the C&O-B&O case to be indefinitely postponed, the Commission pointed out that the affiliation here involved was one for stock control, as sharply distinguished from the other two proceedings which were for merger, and that C&O and B&O would have to file a further application for the Commission's approval prior to taking the irrevocable step of merger, at which time any objecting railroad or other interest would have a second full opportunity to present its views. The Commission also held that B&O's situation—its physical and financial difficulties and its urgent needs—rendered it contrary to the public interest to coun-

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* *Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company—Merger* (I.C.C. Finance Docket Nos. 21510 et al.).

** *Pennsylvania Railroad Co.—Merger—New York Central R. Co.* (I.C.C. Finance Docket Nos. 21989 and 21990).

tenance the indefinite delay which the consolidation of all pending proceedings would impose.

This Commission refusal to consolidate applications before it which were dissimilar, unrelated, and at far different stages of the decisional process, presents no substantial question. An administrative agency's determination on how to transact its own business is not a proper subject for judicial review; the relationship between court and administrative agency is such that questions of procedure in ascertaining the public interest are left to the agency's own devising. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Whether or not to consolidate given applications relates to the proper discharge of the agency's business which must ordinarily be left to the agency. See *Federal Communications Commission* v. *WJR, Inc.*, 337 U.S. 265, 282 (1949); *American Trucking Associations* v. *United States*, 326 U.S. 77, 83 (1945).

Appellants in No. 511 contend that the Commission, in approving C&O stock control of B&O, has pre-determined other pending applications, providing an "overwhelming compulsion" for their approval (J.S., p. 12). It is obvious, however, that the Commission has not in any way fettered its power of decision in other cases. Since the Commission found that C&O stock control of B&O would have no significant impact on other rail carriers, such rail carriers cannot advance it as a reason for approving their applications. Even assuming that C&O stock control of B&O should later prove to have an adverse impact on other carriers (an assumption of fact which we deny could ever occur), this would provide only a reason why C&O stock control of B&O should, pursuant to the stipulation, be further conditioned to prevent this adverse impact. It provides no reason influencing the Commission to approve a railroad unification which it might otherwise find is inconsistent with the public interest.

Appellants in No. 510 argue that, by refusing to consolidate the several proceedings "either for hearing or merely for decisional purposes, the Commission automatically made unavailable to itself evidence which was vital to any meaningful determination of the competitive effects of this proposal upon other railroads . . . . ." (J.S., p. 18). This argument has no merit. The Commission, before approving the C&O-B&O application, was required to be satisfied that it had before it all the evidence needed to prove that the proposal was "consistent with the public interest." It was so satisfied. It determined, on the basis of the mass of evidence to which we previously pointed, that C&O control of B&O would have no significant impact on other carriers. Nothing more was required.

That the Commission did not abuse its discretion in declining to consider the present proceeding with others then pending is solidly confirmed by the hard experience of two decades. As this Court is well aware, Congress directed the Commission to take an expansive approach to the problems of railroad consolidation in the Transportation Act of 1920. Subsection (4) of Section 5 of the Interstate Commerce Act, as it then stood (41 Stat. 481), required the Commission to "prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." A companion subsection (6) authorized two or more railroads to "consolidate their properties or any part thereof, into one corporation" only if the Commission found among other things that such a consolidation was "in harmony with and in furtherance of the complete plan of consolidation" adopted by the Commission.

The two decades during which the Commission wrestled with the problems posed by the statutory requirements proved, to the satisfaction of Congress, that the generalized, expansive approach to the problems of railroad consolidation cannot work. At least, this approach is un-

workable where the Commission lacks the ultimate power of compulsion, a power which Congress has "consistently and insistently denied the Interstate Commerce Commission." *St. Joe Paper Co.*, v. *Atlantic Coast Line R. Co.*, *supra* at 305. In 1940 the Congress heeded the Commission's reiterated pleas and relieved it of the duty of fashioning a master plan for railroad unification. Congress, instead, determined to rely upon the voluntary initiative of rail carriers in attaining the railroad unifications which Congress deliberately intended to encourage. See *Schwabacher* v. *United States*, *supra*.

It is mistaken to believe that a consolidation of the three pending eastern railroad applications could involve something less than the master-planning which proved a failure. Proponents of a consolidation of proceedings before the Commission repeatedly gave as their reason why the proceedings should be consolidated that the Commission could then consider and determine the "placement" of all eastern rail carriers into two or more "systems." It is sheer fantasy to suppose that the Commission could, in one monster consolidated hearing on all pending merger applications, formulate an acceptable plan for railroad consolidation, and thus resolve the problems of eastern railroads at one stroke.

A consolidated hearing, involving the placement of all eastern railroads, would open up such a welter of contingencies, complexities and issues as would inevitably collapse into an unmanageable mass. It would put a premium on recalcitrance. If the inconceivable came to pass and more than a score of eastern railroads were to agree upon a regional plan, one recalcitrant carrier (or one recalcitrant group of its security holders) could block the entire effort. No one could approach such a proceeding with any hope that it could bear fruit. The District Court, whose penetrating questions at the oral argument developed that what Appellants really seek is no

less than a consolidated Commission hearing to determine a unification plan for all eastern railroads, was correct in its view that "such a program would be but a return to a policy that, after long frustration, was found to be unwise, both by the studies made by the Commission and by the Congress of the United States." *

6. The contentions of Appellants in No. 511 which rest on constitutional grounds are plainly insubstantial, and even frivolous. The principal claim is that the Commission, by failure to appoint a "public counsel" to represent it at the hearing, permitted the "private litigants" to develop a "one-sided" record. In some manner, which the District Court stated was never made clear to it, Appellants urged that this lack of Commission "public counsel" involved an abandonment by the Commission of "its statutory duty to protect the public interest in this case to the private litigants before it" (J.S., p. 13). The hearing, somehow as a result, so it was urged, involved an unconstitutional denial of due process to the Appellants—though they presented sixteen witnesses and never offered any complaint at the time that the hearing was unfair.

This whole line of argument is queerly out of joint with the most elementary facts of this proceeding. It is scarcely apt to lump as "private litigants" about 150 parties which included the United States (represented by the Department of Justice), states (five governors testified), counties, cities, public service commissions, port authorities, civic organizations, labor unions, shippers, shipper

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* During oral argument, counsel on Appellants' side acknowledged the possibility that a "consolidated hearing" might well expand to include the rationalization of midwestern and other carriers, with which eastern carriers interconnect and whose service areas are in many instances overlapping (Transcript of Oral Argument, pp. 99-101).

organizations, and of course, rail carriers. To suggest that applicants were permitted to develop a "one-sided" record is scarcely compatible with the fact that 333 witnesses were heard in opposition to the application. It is a fiction of Appellants' creation that the Commission could not discharge its duties without its own appointed public counsel (who would in any event merely supplement the duties of the Commissioner's examiner and Department of Justice attorneys).

Whether it is wise or profligate of taxpayer money to employ "public counsel" is clearly a matter of administrative discretion not a matter of constitutional principle. The ultimate propriety of the Commission's determination must be tested by the adequacy of its findings and the substantiality of the evidence, not by claims that it would have been wise to add one more lawyer to the sixty-nine lawyers whom the Commission's decision lists as appearing in the case (317 I.C.C. 261-262). No constitutional requirement is violated by a Commission determination that sixty-nine lawyers are enough to assure an adequate record, beyond the need of having the taxpayers provide the seventieth.

Arguments that Section 5 of the Interstate Commerce Act is an unconstitutional delegation of legislative power, or that *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945), is controlling, do not in our opinion merit any comment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the District Court should be affirmed.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

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THE BALTIMORE & OHIO RAILROAD COMPANY

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APPENDIX A

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21160

CHESAPEAKE & OHIO RAILWAY COMPANY—CONTROL—BALTIMORE AND OHIO RAILROAD COMPANY

STIPULATION

It is hereby stipulated and agreed by and between the UNITED STATES OF AMERICA, the CHESAPEAKE AND OHIO RAILWAY COMPANY and the BALTIMORE AND OHIO RAILROAD COMPANY, through their attorneys, that, if the Supreme Court of the United States affirms on appeal the order of the United States District Court for the Eastern District of Michigan, Southern Division, in Civil Action No. 23467, entered August 26, 1963, upholding the validity of the report and order of the Interstate Commerce Commission in Finance Docket No. 21160, dated December 17, 1962, wherein the Commission authorized acquisition by the Chesapeake and Ohio Railway Company of direct control of the Baltimore and Ohio Railroad Company, through ownership of capital stock, and through such control, of indirect control of the common carrier subsidiaries controlled by the latter company, or if the plaintiffs abandon their appeal, then and in either such event the Interstate Commerce Commission may, upon application by the United States Department of Justice, enter under Section 5(9) of the Interstate Commerce Act a supplemental order providing that, in addition to the so-called traffic conditions imposed by the Commission in the aforesaid report and order (Appendix VII), the Commission shall retain jurisdiction to impose further conditions and orders as may be necessary and appropriate and in the public interest in the event that

the said control shall be found by the Commission to have resulted in undue diversion of traffic from any other railroad in the territory involved in such transaction; that any party or person having an interest in the subject matter may at any future time make applications to the Commission for the imposition in such event of such further conditions and orders; and that the Commission may reopen the proceeding on its own motion for the same purposes.

/s/ Joseph Saunders
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Attorney for Un. ed
States of America

/s/ Edward K. Wheeler
EDWARD K. WHEELER,
Attorney for Chesapeake
& Ohio Railway Company

/s/ Kenneth H. Ekin
KENNETH H. EKIN,
Attorney for Baltimore &
Ohio Railroad Company

September 30, 1963